No. 7657

In the United States Circuit Court of Appeals for the Ninth Circuit

HARRY W. BERDIE, ET AL., APPELLANTS

v.

CHARLES J. KURTZ, ET AL, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS

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Appellants wish to reply to some of the contentions raised by appellees in their brief, and to clarify some of the issues already discussed in appellants' original brief. These contentions will be answered under the following headings: (1) The bill of complaint should have been dismissed because the case was moot at the time the injunction was entered; (2) the deductions from payments to producers provided for in the Licenses are not a tax; (3) under section 8 of (3) of the Agricultural Adjustment Act, the Secretary of Agriculture has

the power to issue Licenses which fix prices which distributors of agricultural commodities must pay to producers; (4) section 8 (3) of the Agricultural Adjustment Act is not an unconstitutional delegation of legislative power to the Secretary of Agriculture; (5) section 8 (3) of the Agricultural Adjustment Act does not unconstitutionally confer judicial power upon the Secretary of Agriculture; (6) License No. 57 is not invalid as an *ex post facto* law; and (7) the Licenses are valid regulations of interstate commerce.

ARGUMENT

I

The Bill of Complaint should have been dismissed because the case was moot at the time the injunction was entered

Appellees admit in their brief on page 163 that they have transferred that portion of their business "having to do with distribution of fluid milk within that territory known and described as the Los Angeles Sales Area." They argue that because they still distribute milk *outside* the Los Angeles Sales Area the case is not moot. This argument is wholly fallacious because the License regulates distribution only in the Los Angeles Sales Area (R. 118) and hence before this injunction was issued and at the present time appellees are subject to no penalties under section 8 (3) of the Act. *They have voluntarily removed themselves*

from the operation of the Act and the License just as effectively as if they had gone out of business altogether. Their motives in so doing are immaterial. (See *Brownlow* v. *Schwartz,* 261 U. S. 216, discussed in our original brief on page 17.)

The situation here is no different than if appellees had disputed the validity of a tax and then had paid the tax before the entry of a decree in the legal proceedings. The United States Supreme Court has decided several times that such payment even under protest makes the question moot, since *no existing controversy* is present.

Some of these cases are:

> *San Mateo County* v. *Southern Pacific Ry.,* 116 U. S. 138.
>
> *Little* v. *Bowers,* 134 U. S. 547.
>
> *California* v. *San Pablo, etc., R. R.,* 149 U. S. 308.

The efforts of appellees to dispose of the cases cited in our original brief, pages 16–22, are futile since none of the cases cited by them overrule or modify the principle set out in *Mills* v. *Green,* 159 U. S. 651. This principle is:

> * * * If the intervening event is owing *either to the plaintiff's own act* or to a power beyond the control of either party, the Court will stay its hand. (Italics ours.)

The principle for which we here contend has been reaffirmed by the Supreme Court of the United States in a case decided since the submission of

our original brief. In *Amazon Petroleum Corp.* v. *Ryan* (decided January 7, 1935), the plaintiff filed its bill to enjoin federal officials from enforcing Section 4 of Article III of the Code of Fair Competition for the Petroleum Industry, approved by the President pursuant to the National Industrial Recovery Act.[1] By an Executive Order of September 13, 1933, modifying certain provisions of the Code, the paragraph in question was eliminated. It was reinstated by Executive Order of September 25, 1934. The suit was instituted in October 1933. However, neither the plaintiff nor the Government was aware of the fact that the portion of the Code involved in the case had been eliminated by the Executive Order, and the case was tried and decided by the District Court and by the Circuit Court of Appeals upon the false assumption that Section 4 was in effect. The elimination of this section was discovered and called to the attention of the Court only after the case had been docketed in the Supreme Court. The Government advised the Court that it could not and, therefore, did not intend to prosecute the plaintiffs for violations of Section 4 committed prior to September 25, 1934, but that if the plain-

[1] In a subsequent portion of this brief we shall discuss that portion of the Court's opinion dealing with the constitutionality of Section 9 (c) of the National Industrial Recovery Act. At this point we are concerned solely with that portion of the opinion dealing with Section 4 of Article III of the Code of Fair Competition.

tiffs should violate this section subsequent to September 25, 1934, the Government would prosecute.

The Court, however, on this state of the record, refused to pass upon the constitutionality of Section 4 of the Petroleum Code or otherwise to consider the merits of this branch of the case. In this connection the Court said:

> The case is not one where a subsequent law is applicable to a pending suit and controls its disposition (Citing cases). When this suit was brought, and when it was heard, there was no cause of action for the injunction sought with respect to the provision of Section 4 of Article III of the Code; as to that, there was no basis for real controversy. See *California* v. *San Pablo,* 149 U. S. 308, 314; *United States* v. *Alaska Steamship Co.,* 253 U. S. 113, 116; *Barker Co.* v. *Painters' Union,* 281 U. S. 462.
>
> If the Government undertakes to enforce the new provision, the petitioner as well as others, will have an opportunity to present their grievance, which can then be considered, as it should be, in the light of the facts as they will then appear.

Thus even though the plaintiff in the *Amazon* case was subject to prosecution for violations of Section 4 of the Code at the time the case was decided by the Supreme Court, and even though the case had not been rendered moot by the act of plaintiffs, but rather by the act of the Government, the Court refused to consider the merits. In the case

at bar plaintiffs were not subject to prosecution at the time the injunction was granted; they are not subject to prosecution now. *By their own acts* in ceasing to do business in the Los Angeles Sales Area they have rendered the License wholly inapplicable and ineffective as to themselves. As in the *Amazon* case, there was no cause of action for the injunction which plaintiffs sought at the time the order appealed from was entered; they, by their own acts, had destroyed all basis for any real controversy.

We respectfully submit that on the authority of the *Amazon* case and the other cases which we have cited, the bill of complaint should be dismissed.

II

The deductions from payments to producers provided for in the Licenses are not a tax

In their brief, pages 72–79, appellees set forth arguments which are valueless when the nature of the deductions there relied upon is examined. Each of these arguments is based on the assumption that the deductions provided for in the Licenses are "taxes." As we pointed out in our original brief (p. 83) these deductions or charges are not taxes, levied under or referable to the revenue clause of the Constitution, but are a necessary and proper incident to the exercise of the commerce power. These deductions, as explained in our original brief (p. 83), are of two kinds: (1) deduc-

tions per pound of butterfat from the prices paid producers to provide for the expenses of administering the License and to provide specified services to producers; (2) payments by some distributors to be paid out to other distributors, in order equitably to allocate the burden of the surplus milk in the market among all producers. No further obligation is imposed on distributors except that *they pay fixed prices for all milk purchased.*

These charges are not, therefore, revenue measures (as this term is accurately used when the taxing power has been exercised), but an appropriate incident to what has been shown in our original brief to be a permissible regulation of interstate commerce. It is apparent that this plan to regulate the marketing of milk in the Los Angeles Sales Area cannot be self-executing; it requires the expenditure of moneys for services necessary to be rendered in the performance of the plan.

The Supreme Court, in a number of cases, has sustained assessments similar to that involved in the case at bar, and has carefully distinguished such assessments from taxing measures. Thus, in the *Head Money Cases,* 112 U. S. 580, Congress, in the exercise of its commerce power, enacted a statute for the purpose of regulating immigration. This statute provided that owners of vessels transporting immigrants must pay certain charges for the purpose of creating a fund to care for needy immigrants and of defraying administrative expenses

incurred in connection therewith. The argument was presented, as in the instant case, that the charge was an invalid exercise of the taxing power. The Supreme Court held, however, that the charge imposed was not a tax but was an appropriate incident to the power of Congress under the Commerce Clause (p. 595).

> But the true answer to all these objections is that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration. The title of the Act, "An Act to regulate immigration", is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute.

The distinction between an exercise of the taxing power and an appropriate and valid assessment incidental to the exercise of some other power of the Government is clearly brought out by certain Supreme Court decisions dealing with state inspection statutes. In these cases the states, in the exercise of their police power, levied assessments upon certain commodities which were subjected to inspection. In every case where the assessment was only for the purpose of defraying the expenses of inspection, and not for the purpose of securing general revenue in addition thereto, the assessment has been upheld. *Pure Oil Co.* v. *State of Minnesota,*

248 U. S. 158; *Patapsco Guano Co.* v. *North Carolina Board of Agriculture,* 171 U. S. 345. However, where the amount of the assessment clearly exceeded the funds necessary to defray inspection costs, and this excess was to be used for the purpose of supplying the State with general revenue, the assessment has been held invalid on the ground that it is a taxing measure. *Postal Telegraph-Cable Co.* v. *Taylor,* 192 U. S. 64.

The deductions which are authorized under the Licenses cannot be used for any purposes except for those specified in the Licenses. This fact, plus the fact that none of these assessments are paid into the Treasury of the United States, clearly show that these are not taxes. They are clearly only incidental to the regulatory scheme which the Secretary has provided for in the License.

III

Under section 8 (3) of the Agricultural Adjustment Act, the Secretary of Agriculture has the power to issue licenses which fix prices which distributors of agricultural commodities must pay to producers

Appellees assert, on page 97, of their brief, that at no place in the Act is there any language to indicate an intention to confer upon the Secretary of Agriculture the power to fix prices, and, hence, that the price-fixing provisions of the License are beyond the power of the Secretary under the Act.

The licensing provisions of the Act are set forth on pages 3 to 6 of our original brief. It may at

once be conceded that these provisions do not expressly and specifically mention price-fixing. It may likewise be conceded that the language there quoted is general language and requires judicial interpretation. Appellants earnestly contend, however, that Congress has left no doubt on the subject that price-fixing is among the terms and conditions which may be incorporated into such a License.

We take it that no citation of authorities is necessary to establish the fact that wherever statutory language requires interpretation, the courts will always attempt to ascertain the intention of Congress in passing the law; that no part of the statute will be considered nugatory and without meaning wherever it is possible to ascribe thereto a reasonable meaning which will be in harmony with the rest of the statute; and that the courts will not adopt any interpretation of the statute which will clearly defeat its policy.

Congress itself has removed all doubt as to (1) the economic conditions which called forth and "rendered imperative" the passage of the Agricultural Adjustment Act and (2) the *policy* of Congress in passing this statute.

The Declaration of Emergency (quoted at page 2 of our original brief) is an explicit declaration by Congress that, in its judgment, the present depression is, in part, the consequence of a severe and increasing disparity "between the *prices* of agricultural and other commodities"; that this price

disparity has largely destroyed the purchasing power of farmers for industrial products; that such price disparity has broken down the orderly exchange of commodities; that such price disparity has seriously impaired the agricultural assets supporting the national credit structure; and that all these results of the disparity between the prices of agricultural and other commodities have "affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities." Congress further found that the results of such disparity between such prices have rendered imperative the immediate enactment of Title I of the Act.

The outstanding fact which appears from these findings is that, in the opinion of Congress, one of the major causes of the economic crisis is the disproportionate decline in the *price* of agricultural products as compared with industrial products.

Immediately following the Declaration of Emergency is a Congressional Declaration of Policy. The language of this declaration is striking in its emphatic statement of the policy of Congress. Section 2 declares it to be the policy of Congress *to establish* and maintain *such balance between* the *production and consumption* of agricultural products *and such marketing conditions* therefor as will *reestablish prices* to farmers at a level that will give agricultural commodities a purchasing power, with

respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period (August 1909–July 1914). We think it must be conceded that this language is perfectly clear and is couched in extremely broad and comprehensive terms. We think it must likewise be conceded that *had* this language (which is contained in the Declaration of Policy) been incorporated in section 8 (3) there would have been no possibility of any such contention being seriously made as is made in this case. In other words, the language of the Declaration of Policy overwhelmingly shows the clear intention on the part of Congress to do something about establishing and maintaining marketing conditions which will reestablish prices to the farmers. It is obvious that the most direct, simple, and effective method for accomplishing this purpose is to fix the price which farmers shall receive for their products.

The purpose of Congress in passing this law being perfectly clear, we now turn to the means which Congress adopted to achieve this purpose. We find that Congress, wisely, has used very general and comprehensive language in section 8 (3). It has however, expressly stated its intention to incorporate into section 8 (3) the Declaration of Policy itself.

Section 8 provides:

> SEC. 8. *In order to effectuate the declared policy,* the Secretary of Agriculture shall have power—
>
> (1) To provide for reduction in the acreage * * *
>
> (2) To enter into marketing agreements * * *
>
> (3) To issue licenses * * *

It is, therefore, clear that the language contained in the declared policy (which, as we have seen, clearly embraces the power to fix prices) has been *expressly* incorporated into section 8 (3). We would therefore expect to find in section 8 (3) language empowering the Secretary to adopt measures to attain the objectives described in the declared policy by the means therein indicated. Section 8 (3) contains two sentences referring to the issuance of licenses. An examination of the first discloses that the power to issue licenses is *unlimited* except (1) that such licenses must effectuate the declared policy; (2) that the subject-matter must be an agricultural commodity, et cetera, and (3) that such commodity must be handled in the current of interstate commerce. There are no other restrictions on this power. Consequently, its exercise must be subject to a broad discretion. That discretion must be exercised within the area marked out by Congress for the Secretary in its declaration of policy which, as has been seen, clearly and amply includes price fixing.

It may, however, be contended that the second sentence of section 8 (3) constitutes a limitation on the first, and that a License may contain *only* such terms and conditions as may be necessary to eliminate unfair trade practices or charges, et cetera. While we deny that a proper interpretation of the second sentence requires it so to be construed, we will, for the moment, assume that the terms and conditions in a license issued under section 8 (3) are limited to those which are necessary to eliminate unfair trade practices or charges, et cetera. Even if this be granted, we vigorously contend that the language contained in the second sentence is sufficiently broad and comprehensive to include the power to fix prices. It may be urged that the phrase "unfair practices or charges" implies and connotes only such practices as misleading advertising, false representations in selling, and similar practices which the reputable part of the commercial world condemns as unethical and unfair. We submit that it is impossible to reconcile the theory that the Congressional purpose was merely to eliminate the usual forms of commercial dishonesty, with the solemn and serious language contained in the Declaration of Emergency, followed by the Declaration of Policy which left no doubt that the Congressional purpose was to wipe out the disparity between the prices of agricultural and other commodities.

Indeed, the licensing subsection itself contains an express finding by Congress that the unfair

practices or charges that are to be eliminated are those that "tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof." Eliminating the unethical and common practices of unfair competition is but a very feeble step towards ending the depression. It is impossible to believe that after the dramatic Declaration of Emergency and Declaration of Policy Congress should wind up in its statement of the important licensing powers granted to the Secretary by limiting him merely to the power to stop commercial cheating in its usual forms. We believe that opposing counsel's contention can be answered by a *reductio ad absurdum*. If all that Congress meant by the enactment of section 8 (3) was to confer power upon the Secretary to eliminate unfair competition, then it was merely repeating a law already upon the statute books. For section 5 of the Federal Trade Commission Act provides "that unfair methods of competition in commerce are hereby declared unlawful."

Further, it appears from the record in this case that the disastrous decline in the price paid to the producer of whole milk sold in Los Angeles, from $2.68 a hundredweight in 1929 to $1.52 in 1933 (R. 316), has resulted not only from a reduction in the consumptive demand for milk, but also from extended price cutting, price wars, and other methods of destructive competition among distributors, en-

gendered by the depression (R. 317). The record further shows that in the course of such price wars, distributors have reduced the price paid by them to the farmer below the point justified by the existing supply and demand situation, and that the prevalent price-cutting practices in the Los Angeles market endanger the supply of milk for fluid consumption by threatening to force producers and distributors out of business (R. 317–318). We respectfully submit that the price wars and price cutting described in the record in this case are clearly "unfair trade practices" within the meaning of that phrase as used in section 8 (3) of the Act; that they are precisely the kind of practices which Congress sought to eliminate by means of Licenses, for the reason that they "prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products (milk) and the financing thereof." It is further clear that the most direct, and indeed the only effective method, for eliminating the price-cutting practices prevalent in the Los Angeles Sales Area is by fixing the price which distributors must pay to producers for milk. This is precisely the means employed by the Secretary in the Los Angeles Milk Licenses.

Lastly, let us assume (which we deny) that the phrase "unfair trade practices and charges" etc., should be interpreted as the equivalent of the term "unfair competition", used in section 5 of the Fed-

eral Trade Commission Act. We then submit that, properly construed, the second sentence of section 8 (3) does not limit the terms and conditions which the Secretary may, by license, prescribe, but merely requires that every License must, *among other things,* prohibit such unfair competition.

For the foregoing reasons, we respectfully submit that the contention that price fixing is not a term or condition which section 8 (3) contemplated as proper in a License, is without merit.

IV

Section 8 (3) of the Agricultural Adjustment Act is not an unconstitutional delegation of legislative power

Appellees argue on pages 80–102 of their brief that in issuing the Licenses the Secretary is exercising an unconstitutionally delegated legislative power. The recent decision of the United States Supreme Court in *Panama Refining Co. et al.* v. *Ryan et al.* and *Amazon Petroleum Corp. et al.* v. *Ryan et al.,* decided January 7, 1935 (2 United States Law Week, p 409), definitely disposes of this contention. The Court there said:

> Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislation cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality which will enable it to perform its function in laying down poli-

> cies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.
>
> Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility * * *.

The Court examined all of the leading cases on the subject which we have discussed in our original brief (pages 86–90), and reaffirmed the principles upon which the delegation in these cases was upheld.

The only provisions of the National Industrial Recovery Act the constitutionality of which was involved in the *Panama* and *Amazon* cases was Section 9 (c). That section authorizes the President to prohibit the transportation in interstate commerce of petroleum produced in excess of the amount permitted to be produced by any state law. The Court considered this section in the light of the principles established in the cases above referred to and in the light of its definition of the limits of permissible Congressional delegation of power quoted above. The Court pointed out that Section 9 (c) itself contains *no standard whatsoever* to guide Presidential action. It does not set forth, even in the broadest general terms, the conditions which should guide the President in deter-

mining whether or not to exercise the authority delegated to him to prohibit the interstate transportation of petroleum. The Court then proceeded to examine the declaration of policy contained in the National Industrial Recovery Act and all of its other provisions to determine whether the standard, lacking in Section 9 (c), could be implied from any other portion of the Act. The Court found nothing in the declared policy of the Act limiting or controlling the authority conferred upon the President by Section 9 (c). Nor did it find in any other provision of the Act language, which, by reasonable implication, could be said to furnish the President with any standard for determining when to invoke the prohibition authorized by Section 9 (c).

Summarizing its conclusions on this branch of the case the Court said:

> As to the transportation of oil production in excess of State permission the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

The decision of the Supreme Court that Section 9 (c) was unconstitutional thus rests squarely upon the *complete absence* of any standard for Presidential action with respect to petroleum in the National Industrial Recovery Act.

In the preceding section of this brief we have seen that the exercise by the Secretary of the power to issue picenses pursuant to section 8 (3) of the Agricultural Adjustment Act is expressly limited by and conditioned upon compliance with the Declaration of Policy set forth in section 2 of the Act. The Declaration of Policy lays down an immediate objective standard in economic terms: The balancing of production and consumption and the establishment of marketing conditions for agricultural commodities which will secure to the farmer the same purchasing power for the products which he sells enjoyed by him during the period August 1909 to July 1914. The so-called "parity price" for agricultural products which the Declaration of Policy sets out as the goal to be achieved through the mechanisms provided by the Act is not a vague or uncertain concept. It is one which is definite and specific, susceptible of computation by mathematical formula. (See page 89 of our original brief and R. 320, 321.) Thus when Congress delegated to the Secretary of Agriculture the power, through the issuance of licenses pursuant to section 8 (3) of the Act, to effectuate the declared policy by raising the purchasing power of the American farmer to the parity level the Congressional mandate was definite and specific. We respectfully submit that such standard clearly meets the test required by the Supreme Court in the *Panama* and *Amazon* cases and the earlier decisions upon which the Court relies in its opinion.

The number of industries covered by the Agricultural Adjustment Act is innumerable. It appears from the record in this case that the Secretary has issued thirty-eight Licenses for milk alone. These are in effect in widely scattered areas having separate and distinct marketing problems which must be dealt with. In addition, Licenses have been issued for a wide variety of other agricultural products, with respect to each of which methods must be adopted to cope with specialized and peculiar problems. It is obvious that it would be impossible for Congress to specify the host of detailed regulations which must be included in each License issued by the Secretary. Instead Congress has provided a clear and explicit standard, delegating to the Secretary power to create the machinery for effectuating that policy. To require anything further would, in the words of the Supreme Court, give rise to "the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

United States v. *Cohen Grocery Co.,* 255 U. S. 81; and *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, cited by appellees on pages 92–93 of their brief, are not in point. These cases involved criminal prosecutions for violations of statutes which contained no ascertainable standard of guilt. They have no bearing on the question of delegation of power. *There are no penalties in the Act for the violation of Licenses, but only for continuance in business* after revocation of the right to engage in

business under a License specific and explicit in its terms.

For the foregoing reasons we submit that section 8 (3) of the Agricultural Adjustment Act is a valid delegation of power to the Secretary of Agriculture.

One further point in the *Panama* and *Amazon* cases may be considered briefly. The Court held that even though Section 9 (c) were an appropriate delegation of legislative power, the Executive Orders issued by the President pursuant to that section of the Act were invalid because they failed to contain presidential findings of the existence of the required bases of his action. Findings of the character which the Supreme Court indicated were prerequisites of executive action have been made by the Secretary of Agriculture in the case at bar. In the marketing agreement which was executed by the Secretary pursuant to section 8 (2) of the Act contemporaneously with License No. 17 and which contains provisions substantially identical with those prescribed in that License, the Secretary specifically found that the marketing agreement would tend to effectuate the declared policy of the Act, and that the terms and conditions thereof were reasonable in the light of conditions then prevailing in the Los Angeles Sales Area. (Page 11 of marketing agreement, following R. 32.) License No. 17 itself contains a similar specific finding in the following words (License Page 47 following R. 32):

> WHEREAS, pursuant to said act and to said regulations, the Secretary has determined that it is necessary to issue licenses in order to eliminate unfair practices or charges that prevent or tend to prevent (1) the effectuation of the declared policy of said act with respect to milk and its products, and (2) the restoration of normal economic conditions in the marketing of such commodity and the financing thereof; * * *.

Thus it clearly appears that the Secretary of Agriculture has expressly found that the Los Angeles Milk Licenses comply with the mandate of the Act in that they are designed and do effectuate the declared policy of the Act.

V

Section 8 (3) of the Agricultural Adjustment Act does not unconstitutionally confer judicial power upon the Secretary of Agriculture

Appellees allege on pages 102–106 of their brief that the Secretary, in conducting an administrative hearing and revoking a license, exercises judicial power contrary to the provisions of Section 1, Article III, of the Constitution. Administrative proceedings, such as those contemplated by the Act and prescribed by General Regulations, Series 3, have long been recognized as constitutionally valid. The power granted to the Secretary to revoke licenses after an administrative hearing is similar to the powers granted to executive officers in other Departments of the Federal and State Govern-

ments, and to such administrative tribunals as the Interstate Commerce Commission, the Board of Tax Appeals, the Federal Trade Commission, and many others. See *Nishimura Ekiu* v. *United States,* 142 U. S. 651; *Tagg Bros.* v. *United States,* 280 U. S. 420; *Crowell* v. *Benson,* 285 U. S. 22. These are but a few of the many cases involving statutes giving administrative officials the right to act as prosecutor, witness, judge, and jury in determining questions of fact and law which immediately affect the liberty of persons and property.

Section 8 (3) of the Act provides that revocation shall be final by the Secretary "if in accordance with law." This language is a clear invitation to any licensee to have an order revoking his license reviewed in the courts. Since the right to have orders of the Secretary reviewed by the courts is not denied to licensees, the administrative proceeding contemplated by the Act is clearly constitutional. See *Louisville and Nashville R. Co.* v. *Garrett,* 231 U. S. 298.

VI

Administrative proceedings against appellees under License No. 57 are not an attempt to prosecute appellees under an ex post facto law

Article II, Paragraph 7 of License No. 57 (R. 123) provides that each distributor shall fulfill any and all of his obligations which have arisen or may arise under License No. 17 which was terminated contemporaneously with the issuance of

License No. 57. Appellees attack this provision as a violation of the constitutional prohibition against ex post facto laws.

A brief analysis of the purpose of this provision will indicate that the contention of appellees is wholly without merit. The termination of License No. 17, without anything further, would have extinguished all obligations which had accrued thereunder and had not theretofore been paid or performed. The provision of License No. 57 here in question is thus no more than a "savings clause" to prevent the extinguishment of these obligations by reason of the termination of the previous license.

The constitutional prohibition against ex post facto laws renders unconstitutional only such laws as attempt to make an act, *innocent when performed, a crime.* It has been the law since *Calder* v. *Bull,* 3 Dall. 386, that this provision of the Constitution applied only to criminal statutes. *Thompson* v. *Utah,* 170 U. S. 343, and *Duncan* v. *State of Missouri,* 152 U. S. 377, cited by appellees, deal with criminal statutes and punishments. In *Johannessen* v. *United States,* 225 U. S. 227, the Court said, with regard to this provision of the Constitution:

> It is, however, settled that this prohibition is confined to the law respecting criminal punishments, and has no relation to retrospective legislation of any other description.

There are no criminal penalties either in the Agricultural Adjustment Act or in the Licenses issued thereunder for the failure of a distributor to fulfill the obligations imposed upon him by a License. Under neither is the violation of a License a criminal offense.

Further, even if the violations of the Licenses were criminal offenses, this provision of the License would not be unconstitutional as an ex post facto law, because it would not attach criminality to acts which were innocent when done. This paragraph of the License simply provides for fulfillment of obligations *already incurred* and which continue under License No. 57. Such a provision even in a criminal statute would not be invalid. See *Samuels* v. *McCurdy,* 267 U. S. 188.

VII

The Licenses are valid regulations of interstate commerce

Appellees argue strenuously in their brief, pages 23 to 64, that the Licenses are beyond the power of the Federal government. Briefly their reasons are (1) none of the milk produced and/or distributed by them is produced and/or distributed outside of the State of California, (2) the terms and conditions of the Licenses have reference only to local and intrastate transactions.

We admit that the business of the appellees is in itself purely intrastate in character. But it is our position that the Federal Government has power

under the Commerce Clause to regulate the business of distributing fluid milk in the Los Angeles Sales Area because practices in the distribution of such milk exist in the Los Angeles Milk Market which directly burden and affect interstate commerce in dairy products, and that the regulation of the distribution of milk in such intrastate markets as Los Angeles is essential to the raising of the prices received by farmers for the milk which is converted into those dairy products.

The fact that the Licenses regulate local transactions does not render such regulation invalid. We have shown in our original brief, pages 49 to 59, many instances in which the United States Supreme Court has upheld Federal regulation of intrastate transactions because of their effect upon interstate commerce. Once more we wish to call attention to the case of *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, analyzed and discussed on pages 49 to 53 of our original brief, in which Federal regulation of intrastate grain futures contracts (rarely resulting in actual delivery of the commodity) were upheld because of their effect upon the price paid for cash grain which actually moves in interstate commerce.

With the exception of *Hammer* v. *Dagenhart,* 247 U. S. 251; and *Howard* v. *Illinois C. R. Co.,* 207 U. S. 463, every United States Supreme Court case cited by appellees in support of their position is one involving the constitutionality of State and

not Federal statutes. We again respectfully submit that in upholding the power of the State in these cases the Supreme Court did not decide that Congress lacked such power. (See pages 60–64 of our original brief.) In *Hammer* v. *Dagenhart, supra,* there was no showing that child labor affected interstate commerce. In *Howard* v. *Illinois C. R. Co., supra,* the first Federal Employers Liability Act was held invalid because *in terms it was applicable alike to persons engaged in both interstate and intrastate commerce.* Under the second Federal Employers Liability Act, upheld in *Mondou* v. *N. Y., N. H. & H. R. R.,* 223 U. S. 1, there are innumerable instances in which the Supreme Court has sustained its applicability to employees engaged in intrastate activities which affect or are associated with interstate commerce.

The Licenses involved in this case are *units of a comprehensive nation-wide plan* (R. 318) being put into effect by the Secretary of Agriculture pursuant to the powers vested in him by the Act for the purpose of restoring the purchasing power of farmers to its pre-war level. There are at present over fifty of these Federal Milk Licenses in effect in important fluid milk sales areas throughout the country. We have already shown that regulation by means of the License involved here, is essential because of the burden on interstate commerce in dairy products caused by competitive practices in the distribution of fluid milk in the Los Angeles Sales Area. But above and beyond this basis for

Federal power, regulation by means of these Licenses is justifiable under the Act and under previous decisions of the United States Supreme Court because of the effect upon interstate commerce in industrial products brought about by these same competitive practices. We have shown (R. 315, 316, 320, 321) the wide disparity which exists between the price received by producers of milk supplying the Los Angeles Sales Area and the price paid by them for commodities purchased. Agriculture is an industry of tremendous size and of paramount importance, almost one-fourth of which constitutes dairy farming (R. 319). It is perfectly obvious that unless the purchasing power of farmers is increased, interstate commerce in industrial products will be impeded and the industrial recovery of the nation will be hindered.

While transactions in the distribution of milk in the Los Angeles Sales Area may have only a slight effect upon interstate commerce during normal times, they have a decided and an important effect upon interstate commerce in the present economic emergency. The License supplies a marketing plan which stabilizes the fluid milk market in the Los Angeles Sales Area and eliminates one of its most vexing problems by providing for an equitable allocation of the necessary surplus of fluid milk. Destructive trade practices and ruinous competition in the efforts to dispose of this surplus milk, which brought about demoralization of

the Los Angeles and many other milk markets and consequently lowered prices to producers, have been checked by the License.

Appellees in their brief on page 67 have committed a fatal blunder in attempting to distinguish the Anti-Trust cases cited in our brief. *They confuse the economic policy of the Anti-Trust Act with the law of the cases.* In the Anti-Trust Act Congress found that the interests of the nation would best be served by encouraging competition and exercised its power under the Commerce Clause for this purpose. In enacting the Agricultural Adjustment Act Congress found that unbridled competition was undesirable and that cooperation in the agricultural industries would best serve the welfare of agriculture and of the nation. *The question of economic policy is not for the courts to pass upon.* In the very case cited by appellees on page 67 of their brief, *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337 the Supreme Court said:

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court granting the temporary injunction should be reversed

and the cause remanded with directions to dismiss the bill of complaint.

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